In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-153

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION and HONORABLE DAMON J. KEITH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents treat this case as if the electronic surveillance were directed at the respondent-defendant Plamondon in connection with a routine criminal investigation designed to uncover evidence of crime. If that were the theory upon which the Attorney General authorized the surveillance involved in this case, there would be a clear basis in the decided cases for the respondents' contention that the government's failure to obtain prior judicial authorization made it

an unreasonable search and seizure in violation of the Fourth Amendment.

As developed in our main brief (pp. 15-19, 23-28), however, the surveillance in the present case is of an entirely different character, and is governed by different principles. The surveillance ordered in this case was not in connection with a criminal investigation but, as the Attorney General stated in his affidavit filed in the district court (App. 20), "to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." Such surveillances stand on a different footing, and their validity involves different considerations than surveillances in ordinary criminal investigations. These intelligence gathering surveillances involve the authority of the President, acting through the Attorney General, to maintain our on-going intelligence apparatus necessary to deal with those forces, whether foreign or domestic, which threaten the nation's security. In engaging in this activity, the government is seeking information to be used by the President in aid of his constitutional responsibilities, not evidence to be used in a criminal prosecution.

It is, however, true that in the course of such surveillance evidence may be obtained that indicates the commission of a crime. In such an event the government contends that it would be fully warranted in using the evidence thus obtained in prosecuting the crime thus disclosed. As Justice Frankfurter pointed out for the Court in *Abel* v. *United States*, 362 U.S.

217, 238 (a case which involved a warrant issued not by a court but by a subordinate of the Attorney General in the Immigration and Naturalization Service): "When an article subject to a lawful seizure properly comes into an officer's possession in the course of a lawful search it would be entirely without reason to say that he must return it because it was not one of the things it was his business to look for." Cf. also S. Rep. No. 1097, 90th Cong., 2d Sess. 94 (1968). On the other hand, if the purpose of the particular surveillance was not intelligence gathering but obtaining evidence of crime, the evidence could not be introduced against the defendant unless the surveillance had prior judicial approval.

In this case, however, the surveillance was to gather intelligence information, and no evidence relating to any crime charged against the defendants was obtained in connection with this surveillance. But even if such evidence had been obtained the surveillance would, we submit, still retain its basic character as an intelligence gathering technique employed for the protection of the national security. Certainly the President has the authority to conduct surveillances of agents of foreign powers that he deems necessary to protect the country; for the reasons developed in our main brief, his authority is no less with respect to surveillance of a domestic organization actively engaged in an effort to overthrow our government by force.

Moreover, respondents offer no standard that the district court could apply in determining whether to authorize national security intelligence wiretaps, and

it is difficult to formulate a meaningful or appropriate guideline. In the usual criminal investigation, the standard is probable cause for believing that a crime is or has been committed by the particular person or at the particular premises authorized to be searched or seized. But what standard could a magistrate apply in determining whether to authorize surveillance for intelligence gathering purposes in national security situations? A court as a practical matter would have neither the knowledge nor the techniques necessary to determine whether there was probable cause to believe that surveillance was necessary to protect national security. By definition, such surveillance is designed to safeguard the national security before it is injured, not to develop evidence of such injury. The need for such surveillance rarely can be determined on the basis of simple facts and considerations; it frequently involves an evaluation of a large number of complex and subtle factors. The very nature of the judgment involved in deciding whether to authorize a particular national security surveillance itself indicates the inappropriateness of attempting to have a court pass upon the reasonableness of that judgment before the surveillance can be made.[1]

2. In arguing in our main brief (pp. 29-34) that the policy considerations involved in conducting for-

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[1] See Telford Taylor, *Two Studies in Constitutional Interpretation* (1969), where, in discussing *ex parte* orders authorizing electronic surveillance in the usual criminal case, he states, at p. 89: "The investigative issues do not lie within traditional judicial expertise; they are intrinsically police problems, and should be handled by the executive branch."

eign intelligence operations are closely interrelated to those involving national security surveillances, we stated that in comparing the two activities "no sharp and clear distinction can be drawn between 'foreign' and 'domestic' information." The respondent district judge seeks to convert this latter statement into the claim that there is no significant distinction "between foreign and domestic affairs" (Br. 68) and then argues (*id.*, 68-71) that this Court and the Congress frequently have recognized that distinction.

While we recognize that, for many purposes, the authority of the President may be greater in the foreign than in the domestic field, the Chief Executive also is responsible for protecting the nation against domestic disorder and maintaining the stability of our society.

The preamble to the Constitution states that two of its purposes are to "insure domestic Tranquility" and to "promote the general Welfare." Before entering his office the President is required to take an oath that he will "preserve, protect and defend the Constitution" (Article II, Section 1). The Constitution enjoins him to "take Care that the Laws be faithfully executed" (Article II, Section 3).[2] It requires the United States to guarantee to the States "a Republican Form of Government" and, upon request, to

[2] In *In re Neagle*, 135 U.S. 1, 64, the Court noted that the President's duty to "take care that the laws be faithfully executed" extends not merely to enforcement of acts of Congress but to the enforcement of "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all of the protection implied by the nature of the government under the Constitution."

protect the states against "domestic Violence" (Article IV, Section 4).

These provisions make clear that the founding fathers intended to impose upon the President the duty, and correspondingly to clothe him with sufficient authority, to protect the country against all domestic threats, actual or potential, to the national security. Congress has explicitly recognized that authority. In 1795, the Second Congress granted the President broad power to suppress insurrection against both the federal and state governments. These provisions, now contained in 10 U.S.C. 331-336, authorize the President to call the militia into federal service and to utilize it and the armed forces to suppress any "insurrection" against a state government (10 U.S.C. 331), any "unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States" (10 U.S.C. 332), or "any insurrection, domestic violence, unlawful combination or conspiracy" that seriously interferes with the execution of the laws of the United States (10 U.S.C. 333).[3] This authority answers the contention of the *amici* Black Panther Party, *et al.* (Br. 15) that under the Constitution Congress and "not the executive alone" may summon and utilize the militia "as an instrument of domestic policy."

In order properly to perform these functions of protecting the country against domestic disorders,

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[3] A detailed discussion of the President's authority and responsibilities under these statutes and the procedures he utilizes in enforcing them is contained in the Appendix to this brief.

however, the President must have complete and current information with respect to the activities of various groups that may threaten the national security. He cannot act in the dark; he must know what these groups are doing before he can determine what steps to take to meet his constitutional obligations, or to recommend to Congress, when to do so and by what means. The President's need for intelligence information with respect to threats to national security posed by so-called domestic organizations is no less than his need for such information with respect to threats posed by foreign ones. Although the authority of the President to protect the national security from both domestic and foreign threats is a different power from his authority to conduct foreign affairs, electronic surveillance of the type here involved often is employed in aid of both powers, *i.e.*, to provide intelligence information needed to conduct foreign affairs and to protect the national security.

While there are situations in which it is easy to determine whether a particular activity involves foreign or domestic affairs, our point is that, in determining whether the Fourth Amendment forbids electronic surveillance solely because it is conducted without prior judicial authorization, it is not meaningful to draw a distinction between permitted and prohibited surveillance solely on the basis of whether the organization involved is deemed foreign or domestic. The "foreign/domestic" distinction drawn by respondents is, for the question presented here, one without a difference and one that is incapable of meaningful practical application.

The fact that an organization is "domestic" does not mean that its activities cannot involve foreign intelligence operations. A domestic organization, for example, may have a large number of significant foreign contacts and associations that may influence or, indeed, control its domestic activities. Similarly, individuals connected with the domestic organization themselves may have such foreign ties. It is a practical impossibility to apply the distinction to such an organization, unless one uses the principal geographic situs of the organization as the basis for application. The district court did not consider this problem, but grounded its decision on the fact that the *organization*, as distinguished from the *intelligence sought*, was "wholly domestic".

Moreover, it is unrealistic to assume that simply because an organization has a domestic situs, it is any the less a threat to the security of this country than an organization with a foreign situs. Quite the opposite proved true in the case of Nazi Germany's "Trojan Horse" apparatus employed prior to World War II.[4] It is for these reasons that we submit that the President must have as broad authority to gather intelligence information through electronic surveillance in dealing with domestic organizations as he has in dealing with foreign ones.

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[4] "Trojan horse—a device used by German Nazis, of placing espionage and propaganda agents inside the country of an intended victim for purposes of sabotage and direction of native subversion groups." Webster's New Collegiate Dictionary (1961 ed.).

3. The respondent district judge also urges (Br. 64) that however 18 U.S.C. 2511(3)—which is the standard the Attorney General follows in authorizing national security electronic surveillances—may be interpreted, the instant surveillance was invalid for failure of the affidavit of the Attorney General to employ the statutory language. The affidavit, however, was not the authorization for the surveillance. In response to defendant's motion under Rule 16, the affidavit was prepared and transmitted to the court together with the *in camera* submission. This submission contains the signed authorization of the Attorney General, documents characterizing the illegal activities and aims of the organization in question, including information relating to the means by which it intended to achieve its aims, a summary inventory of prior monitored conversations, a document relating to the previous authorization of the prior Attorney General, a description of the premises involved and all overhearings of the defendant-respondent Plamondon. Those documents, and not the affidavit, are the proper basis for determining the ground upon which the Attorney General acted.

4. The government argues in its main brief that if it is determined that electronic surveillance to protect national security is unlawful in the absence of prior judicial authorization, courts should be permitted to determine *in camera* whether illegal interceptions are arguably relevant to a prosecution before requiring disclosure to the defendant. With respect to this contention, it is not necessary here to reiterate the arguments in our main brief to the

effect that the rule of *Alderman* v. *United States*, 394 U.S. 165, is grounded in this Court's supervisory power; that the broad language of *Alderman* should be reexamined; and that Title VII of the Organized Crime Control Act of 1970 represents a congressional rejection of the approach to disclosure of the *Alderman* rule. We do believe, however, that a response is useful to respondents' attacks on our analysis of the scope and significance of the relevant provisions of the Omnibus Crime Control and Safe Streets Act of 1968.

Defendant-respondents find our suggestion that the 1968 Act supercedes the *Alderman* rule of automatic disclosure incredible because the Act precedes *Alderman*. Our point, however, is that in the 1968 Act, Congress prescribed detailed rules for electronic surveillance occurring after June 1968 and that this legislation, inapplicable to the pre-1968 surveillance involved in *Alderman*,[5] indicates that automatic disclosure should not be required here. If our interpretation of the Act is correct, it negates a rule of automatic disclosure of information relating to national security as the penalty for a violation of the Act. If this Court should now hold that a prior court order is required, we think that, as it is clear Congress did not mandate automatic disclosure in situations governed by the 1968 Act, it would not wish a rule of broader disclosure for national security cases.

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[5] Although, in passing, the Court in *Alderman* referred to the Act on a different subject, 394 U.S. at 175-176, it did not mention the Act when it dealt with disclosure.

Judge Keith contends (Br. 79-83) that we have misinterpreted the disclosure provisions of the 1968 Act, and suggests that these provisions require automatic disclosure of the contents of any interceptions determined to be illegal. This interpretation is unsound for a number of reasons.

Section 2515, which Judge Keith cites (Br. 80), does establish an exclusionary rule for illegally obtained evidence. But it leaves open the process by which the relevance of the intercepted communications to proferred evidence is to be determined, and it is that process that is here in question.

Section 2518 (10) (a) provides, as respondents concede, something less than automatic disclosure upon the filing of a motion to suppress evidence. The section covers evidence derived indirectly from electronic surveillance as well as the intercepted communications themselves. In disposing of a motion concerning derivative evidence, a court is faced with both the question of the legality of the interception and with the question whether certain evidence is derived from the interception. In some cases the illegality of the interception will be conceded and the only point at issue will be whether the evidence is derived from the interception. Thus questions of the "relevance" of interception to evidence will be crucial in some cases and sometimes will be the only disputed issue.

If, as respondents argue, Congress had meant to establish automatic disclosure regardless of "arguable relevance" for any illegal interceptions, it surely would have indicated so explicitly. Instead it declined in Section 2518 (10) (a) to distinguish questions of

legality from questions of relevance or "taint", and it refused to provide a rule of automatic disclosure for either, thus "explicitly recogniz[ing] the propriety of limiting access to intercepted communications or evidence derved [sic] therefrom according to the exigencies of the situation" (S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968)).

The passage from the Senate Report concerning Section 2518 (8)(d), which defendant-respondents cite (Br. 143) as Senator McClellan's remarks, do not support respondents' position. Section 2518(8)(d) specifies that notice of the surveillance be given to the person against whom the surveillance is directed, and carefully specifies the required content of the notice, including whether communications were intercepted. The section provides only that the judge "may in his discretion" make available portions of the intercepted communications. The statement from the Report that "all authorized interceptions must eventually become known at least to the subject" (Rep. 1097, *supra*, p. 105), plainly refers only to the mandatory notice; there is no suggestion of an automatic disclosure rule concerning the contents of the communications authorized under § 2518.*

The legislative history of the 1970 Act reinforces our interpretation of the 1968 Act. As our main brief shows, pp. 44-46, both Congressman Poff and Senator McClellan, authoritative spokesmen for the

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* Indeed, it was contemplated that even the mandatory notice might be postponed "almost indefinitely" (S. Rep. No. 1097, *supra*, at 105).

meaning of the Act, indicated that its disclosure provisions were in effect the same as those of the 1968 Act, and the 1970 Act specifically rejects automatic disclosure in favor of a requirement that only information relevant to a claim of inadmissibility need be disclosed.[7]

5(a). Judge Keith points out (Br. 28, n. 16) that the statement in the government's brief (p. 18, n. 7) —based on statistics from the National Bomb Data Center—that there were 3285 bombings in the United States from January 1, 1970, to July 1, 1971, is incorrect. The statement in the government's brief resulted from our clerical error, attributed to a misinterpretation of a change in the reporting format of the National Bomb Data Center. The correct figures for that year, as Judge Keith states, are 1562 incidents involving 2022 bombs. The correct figures, however, reflect a monthly average of 130 "incidents" involving 170 bombs, or roughly 5.5 bombs every day for the year.

(b). The *amici* American Civil Liberties Union *et al.* state (Br. 16-21) that the number of warrantless telephone national security surveillances conducted by the Federal Bureau of Investigation is substantially greater than the government stated in its brief (p. 27, n. 10). The figures given in our brief, as shown by the references to the congressional testimony on

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[7] Judge Keith relies (Br. 83) on Rule 16 (a) of the Federal Rules of Criminal Procedure, but that rule governs disclosure only of "relevant" statements. The question here is whether disclosure need be made when a judge finds no "arguable relevance."

which they were based, were to the number of such surveillances in operation on the day on which the testimony was given. The figures were intended to show that the number of such surveillances in the past ten years has diminished. The figures the *amici* cite, given in correspondence between Assistant Attorney General Mardian and Senator Edward M. Kennedy, refer to the total number of such surveillances in the years involved. That number naturally is larger than the number in use on any particular day.

6. As an alternative ground of affirmance, the defendant-respondents (Br. 148-154), but not Judge Keith, argue that mandamus would not properly lie. The court of appeals correctly rejected this contention (App. 37-39).

The district court's ruling that the surveillance here was unlawful and that the government must disclose the intercepted conversations was not a "final" order reviewable under 28 U.S.C. 1291, and was not within the prescribed classes of interlocutory orders subject to appeal under 28 U.S.C. 1292. Nor could the government have appealed if it had refused to disclose and permitted the indictment to be dismissed. See *United States* v. *Apex Distributing Co.*, 270 F.2d 747 (C.A. 9). While the recent amendments to the Criminal Appeals Act (18 U.S.C. 3731) authorize appeals by the government from certain orders in criminal cases, those provisions do not apply to cases, such as this one, commenced before the amendments were enacted (see P. L. 91-644, Sec. 14(b), 84 Stat. 1890).

Recognizing that "mandamus may not be substituted for appeal" (App. 37), the court of appeals held that mandamus was appropriate in this "extraordinary" case, because the government contended that the lower court's order was illegal and an abuse of discretion, and because the "[g]reat issues * * * at stake" had "never been decided at the appellate level by any court" (App. 39). The court of appeals did not abuse its discretion in concluding that the writ would lie.

The district court's order requiring that the government disclose telephone conversations intercepted during the course of a national security surveillance was based on its legal ruling that such surveillance is unlawful if there has been no prior judicial approval. The order placed the government in the dilemma of either dropping the prosecution of the serious criminal offense involved here, or revealing sensitive national security information which, it believes, the law does not require it to disclose. The underlying issue of the legality of such surveillance is a recurring question of great importance that should be authoritatively settled as soon as possible. In the instant case "there are extraordinary circumstances, [so that] mandamus may be used to review" the disclosure order. *Will* v. *United States*, 389 U.S. 90, 108 (Mr. Justice Black, concurring); see also *Ex parte United States*, 242 U.S. 27; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249; *Schlagenhauf* v. *Holder*, 379 U.S. 104.

CONCLUSION

For the reasons stated here and in our main brief, it is respectfully submitted that the judgment of the court of appeals should be reversed and the case remanded to that court for further proceedings consistent with the opinion of this Court.

ERWIN N. GRISWOLD,
Solicitor General.

ROBERT C. MARDIAN,
Assistant Attorney General.

DANIEL J. MCAULIFFE,
ROBERT L. KEUCH,
GEORGE W. CALHOUN,
Attorneys.

FEBRUARY 1972.

APPENDIX [1]

AFFIDAVIT OF ROBERT E. JORDAN III GENERAL COUNSEL OF THE ARMY

I, ROBERT E. JORDAN, being duly sworn, depose and state:

1. I am General Counsel for the Department of the Army. At all times relevant to this affidavit, that is, since the Summer of 1967, I have been serving either as Deputy General Counsel, Acting General Counsel, or General Counsel of the Department of the Army. In those capacities I have served as the principal Secretariat Advisor to the Secretary and Undersecretary of the Army on civil disturbance matters and have been directly and personally involved in Army Civil Disturbance Planning, as well as in all operation involving the commitment of Federal troops to assist state or local authorities.

2. Under the plan by which the Departments of Defense and Justice (1) coordinate their preparations for their responses to any serious civil disturbances that may hereafter occur in a city in the United States and (2) to assist the President in responding appropriately and effectively to any request he may receive for Federal military troops to aide in suppressing such a disturbance or to enforce Federal law under 10 U.S.C. 3332 or to protect civil rights pursuant to 10 U.S.C. 3333, the Attorney General has been designated by the President as the Chief Civilian Officer in charge of coordinating all Federal Government activities relating to civil disturbances. The Attorney General is so designated because of his re-

[1] This material is contained at pp. 100-102 and 109-115 of Appendix filed with this Court in *Melvin R. Laird, et al* v. *Arlo Tatum, et al.*, No. 71-288, certiorari granted, November 16, 1971.

sponsibilities as Chief Law Enforcement Officer of the Federal Government, and as Chief Legal Advisor to the President on the critically important decisions the President must personally make as to whether and when to permit military forces in response to an appropriate state request.

On the other hand, all essentially military preparations and operations, including especially the employment of military forces at the scene of a disturbance, is the primary responsibility of the Secretary of Defense. In discharging these function, he observes such law enforcement policies as the Attorney General may determine. To the extent practical, such law enforcement policies are formulated during the planning stage so that military commanders can familiarize themselves with them and train their personnel to implement them. This assures that military planning and operations are consistent with Administration policy and the requirements of law.

The responsibilities of the Department of Defense under this plan are carried out principally through the Department of the Army, inasmuch as the Secretary of the Army is assigned primary responsibility for civil disturbance matters, as Executive Agent, subject to the general supervision of the Secretary of Defense. Within the Department of the Army, a Directorate for Civil Disturbance Planning and Operations serves the Secretary and the Army Chief of Staff as the principal military staff agency for such matters.

The Secretary of Defense has the primary responsibility for training, equipping, and designating the forces to be used in controlling civil disturbances. He also retains primary responsibility for preparing operation plans, determining procedures for alerting and moving the forces, and testing command and control arrangements. The Attorney General is consulted on important questions of law and law enforcement poli-

cy arising in connection with these plans and preparations.

When a State Governor anticipates that a request for Federal military assistance will shortly become necessary, he will confer with the Attorney General concerning the facts of the situation, so that the Attorney General can review the legal sufficiency of the impending request. After consultation with Department of Defense officials on the gravity of the situation, the Attorney General will advise the President whether the conditions would warrant honoring a request at that particular time.

When the Governor concludes that a formal request for military assistance is necessary, he will address it directly to the President. At such time, the President must exercise his personal judgment as to whether or not to commit Federal armed forces. The decision may be a difficult one, as it involves a weighing of the apparent need for Federal forces in the circumstances, and the President's responsibility to respond to State requests for such assistance, against the primary responsibility of State and local authorities for maintaining local law and order, and the inadvisability of employing Federal military force for that purpose except in the last resort.

The Attorney General will have furnished the President with an appropriately drawn Proclamation and Executive Order, to be signed by the President in the event that he decides to honor the request. These documents will formalize the decision and state the factual and legal grounds on which it is based.

ROBERT E. JORDAN III
General Counsel of the
Army

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530

Dear Governor:

At the President's request, I am writing you regarding the legal requirements for the use of Federal Troops in case of severe domestic violence within your state. The requirements are simple. They arise from the Constitution. So the principles will be clearly in mind, I will briefly outline here the basic considerations of Federal law applicable to such a situation.

The underlying constitutional authority is the duty of the United States under Article IV, Sec. 4, to protect each of the states "on Application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic Violence." This pledge is implemented by Chapter 15 of Title 10, U.S.C. and particularly 10 U.S.C. 331, which derives from an act of Congress passed in 1795. The history of the use of Federal forces at the request of governors in varied circumstances of local violence over more than a century is also instructive.

There are three basic prerequisites to the use of Federal troops in a state in the event of domestic violence:

(1) That a situation of series "domestic violence" exists within the state. While this conclusion should be supported with a statement of factual details to the extent feasible under the circumstances, there is no prescribed wording.

(2) That such violence cannot be brought under control by the law enforcement resources available to the governor, including local and State police forces and the National Guard. The judgment required here is that there is a definite need for the assistance of Federal troops, taking into account the remaining

time needed to move them into action at the scene of violence.

(3) That the legislature or the governor requests the President to employ the armed forces to bring the violence under control. The element of request by the governor of a State is essential if the legislature cannot be convened. It may be difficult in the context of urban rioting, such as we have seen this summer, to convene the legislature.

These three elements should be expressed in a written communication to the President, which of course may be a telegram, to support his issuance of a proclamation under 10 U.S.C. 334 and commitment of troops to action. In case of extreme emergency, receipt of a written request will not be a prerequisite to Presidential action. However, since it takes several hours to alert and move Federal troops, the few minutes needed to write and dispatch a telegram are not likely to cause any delay.

Upon receiving the request from a governor, the President, under the terms of the statute and the historic practice, must exercise his own judgment as to whether Federal troops will be sent, and as to such questions as timing, size of the force, and federalization of the National Guard.

Preliminary steps, such as alerting the troops, can be taken by the Federal government upon oral communications and prior to the governor's determination that the violence cannot be brought under control without the aid of Federal forces. Even such preliminary steps, however, represent a most serious departure from our traditions of local responsibility for law enforcement. They should not be requested until there is a substantial likelihood that the federal forces will be needed.

While the formal request must be addressed to the President, all preliminary communications should be with me. When advised by you that serious domestic violence is occurring, I will inform the President and alert the proper military authorities. You can reach me at my office, my home, or through the White House switchboard at any hour.

Enclosed are copies of the relevant constitutional and statutory provisions and a brief summary of past occasions on which a governor has requested Federal military assistance. Your legal counsel, I am sure, keeps you fully advised of requirements of state law as well.

If you have any questions or comments, please let me know.

Sincerely,

Attorney General

Enclosures

THE CONSTITUTION

Article IV, Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic Violence.

TITLE 10, UNITED STATES CODE

Chapter 15

§ 331. Federal aid for State governments.

Whenever there is an insurrection in any State against its government, the President may, upon the

request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

* * * * *

§ 334. Proclamation to disperse.

Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.

STATE REQUESTS FOR FEDERAL ASSISTANCE IN SUPPRESSING DOMESTIC VIOLENCE

A. Chronological List

1838—Buckshot War. The Pennsylvania Governor asked for Federal assistance (based on Const. Art. IV, sec 4) in restoring order when violence resulted from a bitter political contest. President Van Buren refused on the ground that Federal interference is justified only where domestic violence in such that State authorities have proved inadequate.

1842—Dorr Rebellion. Rhode Island Governor King asked for assistance to stop the attempt of Dorr to claim the Governorship. President Tyler replied that the time for Federal interference had not arrived since there was no actual insurrection. Further requests were denied on the ground that the legislature was in session and the Governor therefore was not authorized to apply for aid. The President said he

would issue a proclamation if a lawful request was made, but Dorr disbursed his troops and this was not done.

1856—San Francisco Vigilance Committee. California Governor requested Federal aid in stopping the Committee from usurping the authority of the State. The Attorney General advised President Pierce that the circumstances did not afford sufficient legal justification for Federal assistance since there was no "actual shock of arms" between insurgents and the State, and the State had not exhausted its powers to deal with the situation. (8 Op. A.G. 8) The President took no action.

1873—New Orleans unrest. Lawlessness due to racial problems and also political uncertainty as to proper occupants of political office resulted in violence. Louisiana Governor asked for Federal help. President Grant issued a proclamation ordering the insurgents to disperse. Failure to heed the proclamation and increased disturbance resulted in a further proclamation and dispatch of two regiments.

1876—South Carolina riots. Riots resulted from an altercation between the Ku Klux Klan and Negro state militia. The President issued a proclamation in response to a call for Federal intervention and troops were stationed at 70 places in the State to secure the peace during the election. (This action culminated in enactment of Posse Comitatus Act of 1878).

1877—Railroad Strike riots. Upon request for Federal intervention, President Hayes issued proclamations with respect to West Virginia, Maryland, Pennslyvania and Illinois to restore order. The Ohio Governor asked for and received Federal arms but did not request troops. Indiana asked the President to auth-

orize the commandant at the U.S. arsenal to aid the state. On the ground that the request was incorrectly made, the Governor was informed that Federal troops would be used only to protect U.S. property. Michigan, Wisconsin and California also made requests for help but the situation in those states did not become critical.

1892—Idaho's Coeur d'Alene mining disturbances. During a seven year period, President Harrison, Cleveland and McKinley furnished Federal assistance which was requested by Idaho Governors.

1894—Coxey's Army of unemployed. President Cleveland instructed the army to assist Montana in handling violence of Coxeyite contingent in Montana, at the Governor's request. However, the President did not issue a formal proclamation.

1903—Colorado mining strike disturbance. President Theodore Roosevelt denied assistance to the Colorado Governor who made two requests for "such aid as I may call for", but promised that the Federal Government would act when a request was made in a manner "contemplated by law", explaining that under H.R. 5297 there must be shown an insurrection against the State and inability of the State to control it.

1907—Nevada mining disturbance. In response to an urgent request from the Governor, President Roosevelt ordered troops to assist. Later, a President's investigating committee found there was no warrant for the assertion that the civil authority of the state had collapsed. After the President threatened withdrawal of the troops, the Governor convened the legislature, which asked that Federal troops remain for a short period until the State Police could be organized and equipped to handle the situation.

1914—Colorado coal strike. At the request of the Governor, President Wilson sent troops to stop rioting, but only after considerable negotiation and exploring of avenues of peaceful resolution by Government representatives failed.

1919—Race riots in Washington, D.C. and Omaha; Gary steel strike. On the theory that the service by the National Guard in the war left the States without adequate protection against internal disorders, the Secretary of War instructed commanders to the departments to respond to state requests for assistance. The use of Federal troops in 1919 was without a proclamation or other formalities.

1921—West Virginia coal mine warfare. President Harding was requested by the Governor to intervene. The President stated that he was not justified in using Federal military forces until he was assured the State had exhausted all its resources. A subsequent outburst of violence resulted in a Proclamation and order to dispatch Federal troops. The troops met no resistance and disarmed the miners.

1932—The Bonus Army. Needy veterans who came to Washington to seek veterans' bonus legislation were housed in tents, shacks, and government buildings which were being demolished. The Treasury Department attempted to repossess a government building in order to continue demolition, resulting in a clash between the veterans and police. The District Commissioners asked the President for assistance and the army moved in, cleared the buildings and destroyed the shacks. No proclamation was issued.

1943—Detroit race riots. The Governor advised that the State was unable to suppress domestic violence, the President issued a proclamation and Federal troops were dispatched.

1967—Detroit riots. The most recent incident, of course, was the dispatch of Federal troops to Detroit on July 24, 1967 at the request of the Governor. President Johnson issued a proclamation and Executive Order pursuant to Chapter 15 of Title 10, U.S. Code.

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